**SACHS J ABRIDGED JUDGMENT**

*Harksen v Lane NO and Others*

[118] In my view, section 21 of the Insolvency Act 24 of 1936 (the "Act") represents more than an inconvenience to or burden upon the solvent spouse. It affronts his or her personal dignity as an independent person within the spousal relationship and perpetuates a vision of marriage rendered archaic by the values of the interim Constitution, thereby being unfair in terms of section 8(2) of the interim Constitution. It is in this one crucial respect that I find myself unable to concur in what I consider to be an otherwise admirable exposition and analysis of the issues by Goldstone J. I agree with his analysis of the law and disagree only with the way he applies it in the circumstances of the present case.

[119] Goldstone J holds that the differentiation between solvent spouses and other persons who had dealings with insolvents is disadvantageous to the former and that the disadvantage relates to the attributes or characteristics of solvent spouses, thereby discriminating against them. He goes on, however, to find that the inconvenience or prejudice suffered by solvent spouses in the context of the Act does not lead to an impairment of their fundamental dignity or constitute an impairment of a comparably serious nature. He accordingly concludes that the applicant has not established that the discrimination was unfair. I shall briefly explain why, accepting his overall approach to the matter, I find that in fact the dignity and the fundamental rights of personality of solvent spouses are adversely affected in a manner which is unfair and violates section 8(2).

[120] Manifestly patriarchal in origin, section 21 promotes a concept of marriage in which, independently of the living circumstances and careers of the spouses, their estates are merged. If the focus of the legislation had been on members of households rather than on spouses and had related to household property rather than to whole estates, then the inconvenience such merging caused would have been substantial but would not have

raised issues of unfairness. As it is, its reach is too narrow in respect of the classes of persons affected and too wide in relation to the members of the group selected and the range of property which automatically vests to be considered purely as a pragmatic device to deal with collusion of spouses or confusion of goods. Its underlying premise is that one business mind is at work within the marriage, not two. This stems from and reinforces a stereotypical view of the marriage relationship which, in the light of the new constitutional values, is demeaning to both spouses.

[121] Take the case of Jill, a cabinet minister, judge, attorney, doctor, teacher, nurse, taxi driver or research assistant. She has a career, income and estate quite separate from that of her spouse Jack, who for his part has his own career, income and estate. If Jack falls down and breaks his financial crown, it is only on manifestly unfair assumptions about the nature of marriage that Jill should be compelled by the law to come tumbling after him. Their marriage vows were to support each other in sickness and in health, not in insolvency and solvency.

[122] The question, then, is not whether the trustee acts fairly in his or her application of the law, but whether the law itself, in selecting out a group defined in terms of marital relationship, is fair in its rationale, reach and impact. Any appraisal of fairness must, of course, include a balancing of fairness to the creditors with fairness to the solvent spouse. The less the solvent spouse is targeted because of assumptions made about spousal relationships and the more as a result of legitimate concern for the interests of the creditors, the less scope is there for an inference of unfairness. On this question, it is significant that the Act provides adequate mechanisms for securing assets as well as for setting aside voidable dispositions in terms of section 26, voidable preferences in terms of section 29, undue preferences in terms of section 30 or collusive transactions in terms of section 31, without gratuitously intruding on spousal autonomy by virtue of section 21. The conclusion one must draw is that the *raison d'etre* of the legislation is a blunderbuss application of the stereotype and not a fine-tuned satisfaction of the claims.

[123] Nor is the degree of inconvenience the critical factor. Rather, what is most relevant to the question of unfairness is the assumption which puts together what constitutional respect for human dignity and privacy requires be kept asunder. This is one of those areas where to homogenise is not to equalise, but to reinforce social patterns that deny the achievement of equality as promised by the Preamble and section 8. The intrusion

might indeed seem relatively slight. Yet an oppressive hegemony associated with the grounds contemplated by section 8(2) may be constructed not only, or even mainly, by the grand exercise of naked power. It can also be established by the accumulation of a multiplicity of detailed, but interconnected, impositions, each of which, de-contextualised and on its own, might be so minor as to risk escaping immediate attention, especially by those not disadvantaged by them. The path which this Court embarked upon in *Prinsloo v Van der Linde and Another* and *President of the Republic of South Africa and Another v Hugo,* and as confirmed in the judgment of Goldstone J in the present matter, requires it to pay special regard to patterns of advantage and disadvantage experienced in real life which might not be evident on the face of the legislation itself. As Wilson J pointed out in *R v Turpin*:

"... it is important to look not only at the impugned legislation which has created a distinction that violates the right to equality but also the larger social, political and legal context. . . . A finding that there is discrimination will, I think, in most but perhaps not all cases, necessarily entail a search for disadvantage that exists apart from and independent of the particular legal distinction being challenged."

The larger historical context is well articulated by O'Regan J. I am satisfied that the present case points to a form of disadvantage affecting what one might call the moral citizenship (independence and self-fulfilment) of persons who happen to be married.

[124] The incremental development of equality jurisprudence presaged by *Prinsloo* requires us to examine on a case-by-case basis the way in which a challenged law impacts on persons belonging to a class contemplated by section 8(2). In particular, it is necessary to evaluate in a contextual manner how the legal underpinnings of social life reduce or enhance the self-worth of persons identified as belonging to such groups. Being trapped in a stereotyped and outdated view of marriage inhibits the capacity for self-realisation of the spouses, affects the quality of their relationship with each other as free and equal persons within the union, and encourages society to look at them not as "a couple" made up of two persons with independent personalities and shared lives, but as "a couple" in which each loses his or her individual existence. If this is not a direct invasion of fundamental dignity it is clearly of comparable impact and seriousness.

[125] Counsel were unable to point to any other open and democratic society where solvent spouses are singled out for this kind of treatment. Given contemporary international values, I am not surprised, and join with O'Regan J in registering my dissent.